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Office of the Secretary  
Federal Communications Commission  
Washington, D.C. 20554

April 12, 1996

Subject: IB Docket No. 95-59; FCC 96-78  
Comments in Response to Notice of Proposed Rulemaking  
published at 61 FR 10710 on March 15, 1996, proposing to  
add new paragraph (f) to the Commission's Regulations at  
47 CFR Part 25, Section 25.105

Dear Commissioners and staff:

I am providing an original and ten copies of these comments  
and request that any individual copy be provided to each  
Commissioner.

In your summary of the Further Notice of Proposed Rulemaking,  
you requested comments on the statement that "The presumption in  
favor of small antennas can be rebutted only by health or safety  
concerns. Non-governmental restrictions would appear to be  
directed to aesthetic considerations. Thus, we tentatively  
conclude that it is appropriate to accord private restrictions less  
deference on this basis."

This tentative conclusion is incorrect, and indicates a  
misunderstanding of the reasons why homeowners associations exist.  
To illustrate, I would like to quote a pertinent excerpt from the  
Articles of Incorporation of our Association, Article IV, Powers  
and Purpose: "...the specific purposes for which it is formed are  
... to promote the health, safety and welfare of the Owners..."

Many of our covenants duplicate local ordinances. This is not  
a coincidence, nor does it indicate a desire to create unnecessary  
paper. It is because local governments are lax in enforcement.  
While the Commission is correct that non-government entities are  
primarily concerned with aesthetics, homeowners associations  
provide an independent alternative means of enforcement of local  
ordinances, including those intended to promote health and safety.  
Our Association has the enforcement authority to levy fines and, if  
necessary, enter the property to abate an unsafe condition. While  
it could be argued that it should not be necessary for a non-  
governmental entity to enforce a restriction that duplicates a  
local governmental regulation or ordinance, in reality, it is  
sometimes the only effective enforcement available. Local  
governments often lack the will or the resources for adequate  
enforcement. This situation is widely acknowledged, and is in fact  
the primary basis for forming homeowners associations. To compel

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enforcement, an individual would have to initiate a civil action against the offender, or against the local government for failure to enforce, either of which would take a very long time to result in action. This situation is explicitly expressed in the following quote from the Declaration of Covenants, Conditions, and Restrictions for our association (which required approval by the State of Maryland): "There shall be and there is hereby created and declared to be conclusive presumption that any violation or breach or attempted violation or breach of any of the within covenants or restrictions cannot be adequately remedied by action at law or exclusively by recovery of damages."

The Commission's tentative conclusion appears to have been based on incomplete or inaccurate information, and further appears to have resulted in a proposed rule that is not only unnecessarily restrictive, but also unnecessarily pre-empts the legally vested enforcement authority of homeowners associations; an authority that has been voluntarily accepted by individual homeowners; an authority that was created based on the widely acknowledged presumption that there will be little or no, and certainly not effective, enforcement by state and local governments. The proposed rule should be modified to provide non-governmental entities the same opportunity for rebuttal of presumption as currently proved to state and local governments in paragraph (b)(2) of the section 25.104.

Members of homeowners associations voluntarily enter into legally binding agreements that grant police powers to a non-governmental entity to enforce requirements that, historically, have not been effectively enforced by state or local governments. While enforcement of ordinances relating to health and safety matters can be characterized as lax, state and local enforcement of ordinances related to aesthetics would have to be characterized as virtually non-existent. From this perspective, the proposed rule is inconsistent with the stated conclusion. More specifically, if the conclusion is that the primary area of concern for state and local governments is health and safety and the primary area of concern for private entities is aesthetics, then it would be logical that the proposed rule should grant more, not less, deference to private entities in matters of aesthetics than it does to state and local governments. However, just the opposite is true of the proposed rule. The manner in which the term "impair" is used in the proposed rule is so vague and broad that, lacking a specific definition, it could be interpreted that a restriction imposed by a non-governmental entity that resulted in a signal degradation of one billionth of a decibel would be an "impairment," and the restriction would therefore be unenforceable. On the other hand, the Commission has granted a de-facto authority to state and local governments in paragraph (c)(3) of the existing rule to impose aesthetic restrictions constrained only by the limitation that the cost imposed on the individual not exceed the normal cost of equipment purchase and installation. The present wording of the proposed rule does not appear to extend this provision to local entities, and should be revised to do so. It would appear that the simplest means of implementing this change would be to abandon the

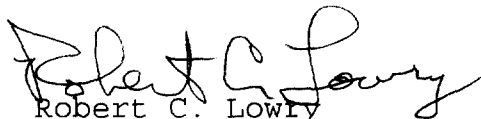
proposed new paragraph (f), and instead revise the existing language of paragraphs (a) through (e) to include non-government entities wherever state and local governments are mentioned.

My remaining substantive comment is on the Initial Regulatory Flexibility Analysis, which is fundamentally flawed in identifying only the small entities beneficially impacted by the proposed rule. It fails to identify real estate developers and management agents as impacted, or to assess those impacts. Homeowners associations are not created by individual homeowners, they are created by real estate developers, and it must be presumed that they would not spend the time and money to do so unless it was necessary to create or sustain some economic benefit. I am not an expert on the industry, but my best guess is that most developers qualify as small entities, and that the number is likely to equal or exceed the number of small businesses that sell or install DBS reception systems.

Many homeowners associations are professionally managed by real estate management agents, most of whom are also small businesses. They would be impacted by the loss of business for covenant enforcement services.

It is not my intent to defend the interests of real estate developers and management agents. Rather, I wish to point out that amending the proposed rule as I have recommended in my previous comments would effectively mitigate the impacts to those small entities.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert C. Lowly". The signature is fluid and cursive, with a large, stylized "R" and "L".

Robert C. Lowly  
President, Ashley Hills Homeowners  
Association, Inc.